No. _____ 98-6322

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*TIMOTHY P. O'TOOLE
Asst. Federal Public Defender
330 S. Third St., #700
Las Vegas, Nevada 89101

* Counsel for Petitioner

RECEIVED
OCT - 5 1998
OFFICE OF THE CLERK
SUPREME COURT. U.S.

93 pp

ANTONIO TONTON SLACK, Petitioner

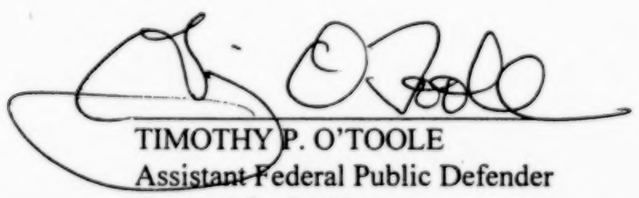
v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Antonio Tonton Slack, asks for leave to file the attached petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the District Court. No affidavit is attached, inasmuch as the District Court appointed counsel for petitioner under the Criminal Justice Act of 1964.

Respectfully submitted,



TIMOTHY P. O'TOOLE
Assistant Federal Public Defender
Counsel for Petitioner

TABLE OF CONTENTS

Page(s)

I. ISSUE PRESENTED 1

II. PARTIES TO THE PROCEEDINGS 2

III. OPINION BELOW 2

IV. BASIS FOR JURISDICTION 2

V. COURT RULES INVOLVED 2

VI. STATEMENT OF THE CASE 3

A. The Judgment of Conviction And Direct Appeal 3
B. Mr. Slack's Proper Person Federal Habeas Corpus Proceeding Is Dismissed Without Prejudice Less Than Three Months After It is Filed. 3
C. Mr. Slack's Returns To State Court, Where His Proper Person State Post-Conviction Proceedings Are Dismissed Without The Appointment of Counsel And Without The Benefit of An Evidentiary Hearing. 4
D. Mr. Slack Returns To Federal Court, Where Counsel Is Appointed And Raises All Known Exhausted Claims And All Unexhausted Claims Which Might Be A Basis For Granting Relief From Petitioner's Conviction And Sentence. 4
E. The District Court Dismisses Most Of Mr. Slack's Claims As "Abusive" Under Rule 9(b), Even Though The Instant Proceedings Cannot Constitute "Second Or Successive" Proceedings Because Mr. Slack has Never Completed His First Round of Federal Habeas Corpus Review, And Mr. Slack Is Not Allowed To Appeal This Ruling. 6

VII. REASONS WHY THE WRIT SHOULD BE GRANTED 8

A. This Court Should Grant the Petition, Vacate the Judgment and Remand for Further Proceedings, Where the Lower Courts Did Not Consider this Court's Intervening Decision in Stewart V. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998), Which Completely Undermines the Analytical Basis for the Lower Courts' Orders in this Case. 11
B. If It Does Not Summarily Remand This Matter To The Court of Appeals, This Court Should Grant Plenary Review to Resolve the Split of Authority among the United States Courts of Appeals Regarding Whether the Provisions of Rule 9(b) Governing "Second or Successive" Petitions May Be Properly Invoked Prior to the Completion

of the "First Full Round" of Habeas Corpus Proceedings. 15

VIII. CONCLUSION 18

CERTIFICATE OF SERVICE 20

INDEX ..... **
**under separate cover

TABLE OF AUTHORITIES

CASES

Page(s)

Barefoot v. Estelle, 463 U.S. 880 (1983) 11

Bradley v. United States, 410 U.S. 605 (1973) 16

Carlson v. Pitcher, 137 F.3d 416 (6th Cir. 1998) 10

Dellenbach v. Hanks, 76 F.3d 820 (7th Cir. 1996) 10, 15

Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996) 6, 7, 9-11, 13, 15, 17

Ford v. Wainwright, 477 U.S. 399 (1986) 13, 14

Granberry v. Greer, 481 U.S. 129 (1987) 17

Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990) 10, 16

Hohn v. United States, __ U.S. __, 118 S.Ct. 1969 (1998) 2

In re Gasery, 116 F.3d 1051 (5th Cir. 1997) 10

In re Turner, 101 F.3d 1323 (9th Cir. 1997) 10

Lawrence v. Chater, 516 U.S. 163 (1996) 11, 12

Lonchar v. Thomas, 517 U.S. 314 (1996) 18

Lozada v. Deeds, 498 U.S. 430 (1991) 10

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996) 13, 15

McCleskey v. Zant, 499 U.S. 467 (1991) 6-8, 15, 17, 19

Rose v. Lundy, 455 U.S. 509 (1982) 4, 6, 7, 18

Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998) 1, 9, 11-13, 19

Stutson v. United States, 516 U.S. 193 (1996) 12

Woods v. Whitley, 933 F.3d 321 (5th Cir. 1991) 10, 16

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2244(b) 9

Fed. R. Civ. Pro. 15(a) 17

Rule 9(b) of the Rules Governing Section 2254 ..... 1, 2, 6-8, 10, 15

Supreme Court Rule 10(a) 11, 17

OTHER PUBLICATIONS

Federal Habeas Corpus Practice and Procedure 18

Liebman & Hertz, § 28.3a (2d ed. 1994) 18

Liebman & Hertz, § 28.4d 18

98-6322
Slack
v.
McDaniel

I.

ISSUE PRESENTED

A. Should this Court grant certiorari, vacate the judgment and remand for further proceedings, in a case where the lower courts held that a habeas corpus petition filed following a previous dismissal without prejudice for lack of exhaustion constituted an abusive "second or successive petition" but did not consider this Court's contrary holding in its intervening decision in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998)?

B. Should this Court grant plenary review to resolve the split of authority among the United States Courts of Appeals regarding whether the provisions of Rule 9(b) of the Rules Governing Section 2254 Cases, which governed the filing of "second or successive petitions" prior to the passage of the Anti-Terrorism and Effective Death Penalty Act, may be properly applied to a petition filed after a previous petition had been dismissed without prejudice for exhaustion, so that the doctrine of abuse of the writ is being invoked before completion of the "first full round" of habeas corpus proceedings?

II.

PARTIES TO THE PROCEEDINGS

There are no parties to this proceeding other than those listed in the caption.

III.

OPINION BELOW

The memorandum decision and order of the United States District Court is unpublished. App. 1. The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal is also unpublished. App. 2.[1]

IV.

BASIS FOR JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal was filed on July 7, 1998. Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1). See Hohn v. United States, __ U.S. __, 118 S.Ct. 1969, 1978 (1998) ("this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability").

V.

COURT RULES INVOLVED

Rule 9(b) of the Rules Governing Section 2254 Cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those

[1] There are no parties to this matter other than those named in the caption.

grounds in a prior petition constituted an abuse of the writ."

VI.

STATEMENT OF THE CASE

A. The Judgment of Conviction And Direct Appeal.

In 1989, the State of Nevada charged 19-year-old petitioner Antonio Tonton Slack with First Degree Murder in connection with the shooting death of Alanna Holmes. At trial, Mr. Slack admitted to having shot Ms. Holmes but asserted that the killing was accidental. On May 16, 1990, a jury convicted Mr. Slack of Second Degree Murder. The state trial court sentenced Mr. Slack to life in the Nevada State Prison for the Second Degree Murder, and imposed a consecutive life sentence because Mr. Slack used a deadly weapon in connection with the killing. App. 3.

Mr. Slack pursued a timely direct appeal to the Nevada Supreme Court. On appeal, Mr. Slack's court-appointed counsel:

(1) Challenged the sufficiency of the evidence to support the conviction;
(2) Argued that the trial court had improperly allowed the jury to hear prejudicial evidence regarding his alleged sexual relationship with the underaged victim;
(3) Asserted that the Nevada reasonable doubt instruction was unconstitutional; and
(4) Challenged the standard Nevada premeditation instruction.

On November 5, 1991, the Nevada Supreme Court dismissed Mr. Slack's appeal. App. 4.

B. Mr. Slack's Proper Person Federal Habeas Corpus Proceeding Is Dismissed Without Prejudice Less Than Three Months After It is Filed.

On November 27, 1991, Mr. Slack filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada. The proper person petition raised the same federal constitutional issues that Mr. Slack originally raised in his brief to the Nevada Supreme

Court. App. 5. On December 10, 1991, the United States District Court ordered the State of Nevada to file a response addressing "the merits of the petition." App. 6. After the State of Nevada obtained an extension of time to answer, however, Mr. Slack moved to stay the proceedings "pursuant to Rose v. Lundy, 455 U.S. 509 (1982)," so that he could pursue unexhausted claims. On February 19, 1992, the district court instead dismissed the petition "without prejudice" and granted Mr. Slack leave "to file an application to renew upon exhaustion of all State remedies." App. 7.

C. Mr. Slack's Returns To State Court, Where His Proper Person State Post-Conviction Proceedings Are Dismissed Without The Appointment of Counsel And Without The Benefit of An Evidentiary Hearing.

On July 10, 1992, Mr. Slack, again acting in proper person, filed a Post-Conviction Petition for Writ of Habeas Corpus in the Nevada state trial court. Among other things, Mr. Slack alleged that he had been denied his Sixth and Fourteenth Amendment rights to the effective assistance of trial and appellate counsel, and made a number of factual averments supporting this claim. Without appointing counsel, the state trial court summarily denied the petition. App. 8.

On February 1, 1993, Mr. Slack filed a timely notice of appeal. On December 30, 1993, without appointing counsel and without any briefing, the Nevada Supreme Court dismissed the appeal, ruling that Mr. Slack's claims were "repelled by the record," and concluding that briefing and oral argument were unwarranted. App. 9.

D. Mr. Slack Returns To Federal Court, Where Counsel Is Appointed And Raises All Known Exhausted Claims And All Unexhausted Claims Which Might Be A Basis For Granting Relief From Petitioner's Conviction And Sentence.

On March 27, 1995, Mr. Slack returned in proper person to the United States District Court and filed an amended petition for writ of habeas corpus. App. 10. On June 1, 1995, Mr. Slack moved for the appointment of counsel. App. 11. The State of Nevada opposed the motion, urging

the court not to "waste scarce judicial resources." App.24. On February 29, 1996, the district court denied Mr. Slack's motion for the appointment of counsel. App. 12.

After the State filed additional procedural motions seeking a more definite statement and seeking to dismiss for lack of factual exhaustion, on December 31, 1996, Mr. Slack renewed his request for the appointment of counsel. App. 13. The State of Nevada again opposed the motion.

On February 13, 1997, the district court concluded that "it appears to be in the best interest of justice that counsel be appointed to represent petitioner herein." App. 14. The district court appointed the Federal Public Defender to represent Mr. Slack, and directed counsel to "discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case . . . advise petitioner that all possible grounds for habeas corpus should be raised at this time, and that failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ." App. 14. The Court allowed counsel time to review the file and amend the petition. App. 14.

On December 24, 1997, counsel for Mr. Slack filed an Amended Petition For Writ of Habeas Corpus, which is the operative pleading in this case. App. 15. The Petition alleges seven federal constitutional grounds for relief:

(1) Insufficient evidence to support the conviction;
(2) Insufficient notice provided by the charging document;
(3) Improper introduction of evidence of Mr. Slack's sexual relationship with the victim;
(4) Failure of the trial court to properly instruct the jury on reasonable doubt, premeditation and deliberation, and malice aforethought;
(5) Ineffective assistance of trial counsel through
    (a) Failure to take steps to prevent the introduction of sexual misconduct evidence;
    (b) Failure to object to improper jury instructions;

and

(c) Failure to develop the facts of the case and present available defenses.

(6) Ineffective assistance of appellate counsel; and

(7) Cumulative error,

Counsel acknowledged that issues 2 and 4(c) had not yet been presented to the state courts. App. 15.

E. The District Court Dismisses Most Of Mr. Slack's Claims As "Abusive" Under Rule 9(b), Even Though The Instant Proceedings Cannot Constitute "Second Or Successive" Proceedings Because Mr. Slack has Never Completed His First Round of Federal Habeas Corpus Review, And Mr. Slack Is Not Allowed To Appeal This Ruling.

On December 28, 1997, the State moved to dismiss based on the lack of complete exhaustion. See Rose v. Lundy, 455 U.S. 509, 510 (1982). App. 16. The State further argued that because Mr. Slack had returned to state court without exhausting grounds 2, 4(c), 6 and 7, those claims were subject to the standards that govern "second or successive" petitions under Rule 9(b) of the Rules that Govern Section 2254 cases. See Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996) (App. 23). According to the State, by noting Mr. Slack's prior writ history and pleading abuse of the writ, it had shifted the burden to Mr. Slack to demonstrate "cause and prejudice" under McCleskey v. Zant, 499 U.S. 467 (1991). Absent such a showing, the State asserted, the district court was compelled to dismiss claims 2, 4(c), 6 and 7 as abusive. App. 16.

In response, Mr. Slack argued that the substance of most of the claims in the petition had already been fairly presented to the state courts and thus met the exhaustion requirement. App. 17. Mr. Slack further asserted that even if any of his claims were deemed unexhausted, those claims could not be barred as abusive because (1) He had not completed a first round of federal habeas and in fact had never received a prior adjudication of his claims; and (2) Any unexhausted claims could

not be deemed "abusive" under Rule 9(b) or under Farmer because they had not been deliberately withheld. App. 17.

On March 11, 1998, the district court entered an order concluding that because Mr. Slack had not raised Claims 2, 4(c), 5, 6 and 7 in his previous petition, those claims were presumptively abusive under Rule 9(b) and under McCleskey. The district court accordingly directed Mr. Slack "to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds 2, 4(c), 5, 6 & 7 of the instant amended habeas petition." App. 18. The court's order explained that the only way Mr. Slack could overcome a finding of abuse was to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" -- the standard McCleskey applies to "second or successive" petitions. App. 18.

On March 26, 1998, Mr. Slack filed a motion for reconsideration of the district court's order. In that motion, Mr. Slack asserted that no finding of abuse of the writ was possible because the amended petition did not constitute a "second or successive" one within the meaning of Rule 9(b). Mr. Slack accordingly argued that the court could not find Rule 9(b) abuse. App. 19.

On March 31, 1998, the district court entered an order dismissing Mr. Slack's petition. App. 1. The lower court concluded that grounds 2, 4(c), 5, 6 & 7 were abusive under Rule 9(b), Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996) and McCleskey v. Zant, 499 U.S. 467 (1991). The court thus dismissed those claims with prejudice. The district court further concluded that Claim 3 was unexhausted, and dismissed the remainder of the claims without prejudice pursuant to Rose v. Lundy. App. 1.

On April 29, 1998, Mr. Slack filed a timely notice of appeal. App. 20. On May 11, 1998, Mr. Slack filed an application for a certificate of probable cause to appeal, arguing that it was at least

debatable among jurists of reason whether the lower court erred regarding its dismissal of Claims 2, 4(c), 5, 6 & 7 as abusive. App. 21. Specifically, Mr. Slack explained that debatable issues existed (1) with regard to whether his amended petition constituted a "second or successive" one under Rule 9(b), (2) with regard to whether the lower court properly applied the abuse of the writ standard under these facts, where there was no showing that he had deliberately withheld any of the claims; and (3) with regard to whether the lower court properly determined that claim 3 was unexhausted. App. 21.

On May 19, 1998, the district court denied Mr. Slack's application for a certificate of probable cause to appeal. App. 22. On July 7, 1998, a two-judge panel of the United States Court of Appeals for the Ninth Circuit summarily denied Mr. Slack's request for a certificate of probable cause. App. 2.

VII.

REASONS WHY THE WRIT SHOULD BE GRANTED

What should not be lost amidst the procedural history of this case is this simple reality: Mr. Slack has never received an adjudication by the federal courts of any of his claims, and yet, the lower courts have ruled that his initial, uncounseled foray into federal court -- which lasted less than 3 months, and which was expressly dismissed "without prejudice" to allow for exhaustion -- has essentially foreclosed him from raising all available claims during this initial round of federal habeas proceedings. The lower courts' ruling substantially departs from the spirit of Rule 9(b) and the language of McCleskey v. Zant, 499 U.S. 467 (1991), which established strict abuse of the writ standards for successive petitions, under the express theory that a petitioner had already received a full and fair round of habeas corpus adjudication.

The basis for this eccentric ruling preventing Mr. Slack from litigating his claims in federal

court traces directly to Farmer v. McDaniel, 98 F.3d 1548, 1555-57 (9th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 1474 (1997), where a divided panel of the Ninth Circuit ruled that a petition can properly be labeled "second or successive" -- and therefore abusive under Rule 9(b) -- even though all previous petitions had been dismissed "without prejudice" for lack of complete exhaustion.

The erroneous and unsupportable nature of the holding in Farmer (and the consequent ruling below) has now become indisputable in light of Chief Justice Rehnquist's recent majority opinion in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998). There, this Court explained that, under 28 U.S.C. § 2244(b) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a "second or successive" petition is a legal term of art with a longstanding application in pre-Act case law, and held that a petition filed after previous petitions have been dismissed without prejudice on technical grounds, including the ground of non-exhaustion, is not "second or successive." This decision abrogates the rule of Farmer, upon which the lower courts based their rulings in this case. Because the lower courts did not have the benefit of Martinez-Villareal when they issued their rulings in this case, this Court should grant the petition, vacate the judgment below, and remand for further proceedings in light of Martinez-Villareal.

Alternatively, this Court should grant plenary review to resolve the split of authority among the United States Courts of Appeals regarding whether the provisions of Rule 9(b) governing "second or successive" petitions may properly be invoked even though the petitioner has never received a "first full round" of habeas corpus proceedings. To petitioner's knowledge, no other appellate court has so held. At least three Courts of Appeals squarely disagree with Farmer (and the consequent decision here), instead holding that a petition cannot, as a matter of law, trigger abuse-of-

the-writ analysis under Rule 9(b) unless a prior petition has already been adjudicated.[2] Every Court of Appeals has held that the same "second or successive" language contained in the AEDPA excludes from its definition petitions filed after a federal court dismissed a prior petition without prejudice for exhaustion.[3]

In fact, even the Ninth Circuit has held, in an opinion issued just three months after the decision in Farmer, that a petition filed after a previous petition has been dismissed for lack of exhaustion is not "second or successive" under the AEDPA. In re Turner, 101 F.3d 1323 (9th Cir. 1997). The ruling below accordingly creates an extremely anomalous and confusing scenario within the Ninth Circuit: As the law in that Circuit now stands, a litigant who has had previous petitions dismissed for exhaustion and who returns to federal court after the effective date of the AEDPA is clearly entitled to have his claims adjudicated under the same standards as those that would govern in any first petition, whereas a litigant like Mr. Slack, whose case is governed by the supposedly more lenient pre-AEDPA standards can, under Farmer, have his claims dismissed as abusive pursuant to Rule 9(b) despite never having completed any round of federal habeas review.

In short, the lower courts' rulings in this case, especially in combination with the Farmer decision, conflict with those in other courts of appeals, and create a great potential for confusion and unfairness. Because the issue presented by this petition is currently the subject of debate among judges in the various circuits, it was not only worthy of the Court of Appeals' attention, Lozada v. Deeds, 498 U.S. 430 (1991) (courts of appeals should grant certificates of appealability as to issues that debatable among reasonable jurists); Barefoot v. Estelle, 463 U.S. 880, 892-93 (1983) (same), it is worthy of consideration by this Court as well. See Supreme Court Rule 10(a).

[2] E.g., Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990); Woods v. Whitley, 933 F.3d 321, 322 (5th Cir. 1991).

[3] E.g., Carlson v. Pitcher, 137 F.3d 416, 420 (6th Cir. 1998); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997).

A. This Court Should Grant the Petition, Vacate the Judgment and Remand for Further Proceedings, Where the Lower Courts Did Not Consider this Court's Intervening Decision in Stewart V. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998), Which Completely Undermines the Analytical Basis for the Lower Courts' Orders in this Case.

As noted, the lower court relied on Farmer v. McDaniel, 98 F.3d 1548, 1555-57 (9th Cir. 1996) to support dismissal of most claims in Mr. Slack's petition, even though Mr. Slack's previous federal petition was dismissed for lack of exhaustion. The district court and the court of appeals then summarily denied permission to appeal. Because the lower courts did not have the benefit of this Court's decision in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998), and because the lower court rulings cannot withstand scrutiny under the standards used in that decision, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of Martinez-Villareal.

This Court's power to GVR in light of an intervening decision of this Court is well-established:

> [T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent judges. We have GVR'd in light of a wide range of developments, including our own decisions . . . .

Lawrence v. Chater, 516 U.S. 163, 166-67 (1996).

As this Court has explained:

> In an appropriate case, a GVR order conserves the scarce resources

> of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues . . . ."

Id. at 167. For this reason, where "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration . . . a GVR order is, we believe, potentially appropriate." Id. at 167; accord Stutson v. United States, 516 U.S. 193 (1996) (relying on GVR standards of Lawrence and emphasizing the importance in criminal cases of ensuring that the lower courts considered this Court's authority when they issued their rulings).

The GVR standards could have been written with this case in mind. Here, there can be no dispute that the lower court decisions were rendered without the benefit of this Court's decision in Martinez-Villareal. That decision was entered on May 18, 1998, almost 45 days after the district court entered judgment, almost three weeks after Mr. Slack filed his notice of appeal, and the day before the district court denied Mr. Slack's application for a certificate of probable cause. The district court does not mention Martinez-Villareal in any of its orders, and there is no reason to believe that the Court of Appeals considered the ruling either, since it does not mention the case in its one-sentence order denying Mr. Slack's request for a probable cause certificate.

It is, moreover, reasonably probable that the Court of Appeals will reconsider its ruling if given the opportunity. The Ninth Circuit's ruling, like the district court's ruling, rests on a determination that the term "second or successive petition," as set forth in Rule 9(b) of the Rules

That Govern Section 2254 Cases,[4] includes a petition filed after an earlier petition has been dismissed without prejudice due to the lack of complete exhaustion.

As the Court of Appeals explained in Farmer,

> [Petitioner] says that Rule 9(b)'s reference to "second or successive petition" incorporates the concept of a prior merits determination into both clauses . . .Given how [the rule] is actually written, [however], we cannot say that Rule 9(b) itself requires that the prior petition be one that was resolved on the merits.

Farmer, 98 F.3d at 1555.

Reasonable jurists not only could conclude, they in fact would be bound to conclude, that this holding cannot logically survive this Court's analysis in Stewart v. Martinez-Villareal. The habeas petitioner there had filed three petitions for habeas corpus relief prior to 1993, all of which were dismissed due to lack of complete exhaustion. Mr. Martinez-Villareal then filed a fourth federal petition in 1993, which included a claim of incompetence to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), which was dismissed for lack of ripeness. Both the lower court and the court of appeals adjudicated the remainder of the petition. See Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996).

After enactment of the AEDPA, Mr. Martinez-Villareal moved to reopen litigation of the incompetence-to-be executed claim. The Court of Appeals held that such a petition was not a "second or successive" one within the meaning of 28 U.S.C. § 2244(b)(3)(A). Martinez-Villareal v. Stewart, 118 F.3d 628, 632-33 (9th Cir. 1998)(per curiam).

---

[4] Rule 9(b) provides: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

This Court affirmed. According to Chief Justice Rehnquist's majority opinion, the new petition containing the Ford claim did not constitute a "second or successive" application for relief. The Court analyzed that question as controlled by its precedents dealing with the exhaustion defense:

> None of our cases expounding this [exhaustion] doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

Id. at 1622.

There is no way to reconcile this holding with the rulings of the courts below. Despite the fact that Mr. Martinez-Villareal had filed three previous petitions -- and returned to state court several times to exhaust -- this Court squarely held that his claims were governed by the standards that applied during the "first round" of federal habeas proceedings because his later petitions were not "second or successive." By contrast, before his lawyer filed the operative petition in this case, Petitioner Slack had filed single federal petition in proper person, which was dismissed "without prejudice" for exhaustion after pending for less than three months. The instant petition was Mr. Slack's first post-conviction petition -- state or federal -- prepared by counsel. Unlike Mr. Martinez--Villareal, who, before this Court's opinion last term, had received adjudication of many of his other claims on the merits -- Mr. Slack has never had **any** federal court address any of his claims no court has even been presented with a single claim prepared by counsel before the filing of the instant petition. And yet, the lower courts attached momentous and unfair consequences to the mere filing of an earlier petition, holding that Mr. Slack's new petition was "successive," and refusing to adjudicate Mr. Slack's claims "under the same standard as would govern those made in any other

first petition." Instead, they used the restrictive standards this Court announced in McCleskey for the adjudication of successive petitions.

That result is fundamentally irreconcilable with Martinez-Villareal. Because the lower courts' rulings were made without the benefit of this Court's ruling in Martinez-Villareal, and because, absent action by this Court, Mr. Slack will have been treated in a fundamentally unequal and discriminatory manner, this Court should grant the petition, vacate the judgment, and remand for further proceedings.

B. If It Does Not Summarily Remand This Matter To The Court of Appeals, This Court Should Grant Plenary Review to Resolve the Split of Authority among the United States Courts of Appeals Regarding Whether the Provisions of Rule 9(b) Governing "Second or Successive" Petitions May Be Properly Invoked Prior to the Completion of the "First Full Round" of Habeas Corpus Proceedings.

If this Court determines that a remand for reconsideration in light of Martinez-Villareal is inappropriate, this Court should grant plenary review to address whether the provisions of Rule 9(b) may properly be invoked prior to the completion of the "first full round" of federal habeas corpus proceedings. The Ninth Circuit's ruling in this case, as well as its prior decision in Farmer, have created a split among the circuits, which warrants this Court's corrective intervention. See Supreme Court Rule 10(a).

As noted, both Farmer and the decision below hold that a "second or successive petition" under Rule 9(b) may include one filed after an earlier petition had been dismissed without prejudice due to lack of complete exhaustion. Mr. Slack was unable to find a single opinion agreeing with that position: at least three other circuits have resolved the issue in a directly contrary fashion. E.g., Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996) (per Posner, C.J.) (petition filed after two

earlier ones dismissed for lack of exhaustion did not trigger abuse of the writ doctrine; "it is not an abuse to file a successive petition if the previous petition or petitions were not denied on the merits."); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990) ("the district court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition"); Woods v. Whitley, 933 F.3d 321, 322 (5th Cir. 1991) (same).

Consistent with the longstanding principle that terms retain their legal definition even when the law changes, Bradley v. United States, 410 U.S. 605, 609 (1973), all of the circuits (including the Ninth) that have considered the meaning of the term "second or successive petition" under the AEDPA have likewise concluded that a petition filed after an earlier petition had been dismissed for lack of complete exhaustion is not a "second or successive petition." [5]

---

[5] E.g., In re Wilson, 142 F.3d 939, 940 (6th Cir. 1998) ("this court joined every other court to consider the question and held that a habeas petition filed after a previous petition was dismissed without prejudice for failure to exhaust state court remedies is not a 'second or successive' petition"); McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997) ("[w]e instead accept the view espoused by every circuit that has considered this issue since enactment of the Antiterrorism and Effective Death Penalty Act: a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1)."") (citations omitted); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (agreeing with "the First, Second, Seventh, and Ninth Circuits," and holding, that a habeas petition filed after dismissal without prejudice for failure to exhaust is not a "second or successive" petition); Christy v. Horn, 115 F.3d 201,208 (3d Cir. 1997) ("We hold that when a prior petition has been dismissed without prejudice for failure to exhaust state remedies ... the petitioner may file his petition in the district court as if it were the first such filing."); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (rejecting definition of "second or successive" petition that would include prior petitions dismissed for failure to exhaust and stressing that "[t]he sequence of filing, dismissal, exhaustion in state court, and refiling in federal court might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks. The prisoner launched a single campaign; that skirmishes were spread across several years and two forums would not make it apt to call any of the steps a 'successive' collateral attack."); In re Turner, 101 F.3d 1323 (9th Cir. 1997) ("We hold that section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies"); Dickinson v.

Given the eccentric nature of the ruling below and the published opinion in Farmer on which it relies, Mr. Slack suggests that the issue is ripe for this Court's consideration. Supreme Court Rule 10(a). The ruling below applies the strict abuse-of-the-writ standards of McCleskey in a manner this Court could never have intended, and appears to have done so solely to address the potential situation where a litigant abuses the exhaustion process to delay the ultimate disposition of the case. But the procedural history here demonstrates beyond dispute that Mr. Slack -- who did not have counsel to represent him in state or federal post-conviction proceedings until filing the operative petition here -- was not attempting to delay a ruling on the validity of his conviction and life sentence. And even if he was, a district court faced with what it truly believes to be abusive litigation tactics in the first round of federal habeas corpus proceedings can already: (1) invoke the provisions of Rule 9(a) where the State can prove that intentional delay by the petitioner results in prejudice to the State; (2) stay the original proceeding during the exhaustion process and then deny leave to amend a petition under Fed. R. Civ. Pro. 15(a) if the amendment process is being used in an abusive fashion; or (3) reach the merits of the petition under Granberry v. Greer, 481 U.S. 129, 134 (1987), if the district court determines that "the interests of comity and federalism will be better served by addressing the merits forthwith."

The one thing the lower courts cannot do, however, is exactly what they did do here: Depart from settled interpretations to formulate "ad hoc" reasons for dismissal that are "not encompassed

---

Maine, 101 F.3d 791 (1st Cir. 1996) (holding that petition, filed after first petition was dismissed for failure to exhaust, is not a "second or successive" one); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) ("When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.").

within the framework of Rule 9." Lonchar v. Thomas, 517 U.S. 314, 321 (1996). Indeed, as this Court emphasized in Lonchar, 517 U.S. at 324, the "arguments against departure from settled rules would seem particularly strong when dismissal of a first habeas petition is at issue."[6] But the lower courts have engaged in just such a departure here, in breach of both Lonchar and the promise of Rose v. Lundy, 455 U.S. at 520, where in justifying the rule of complete exhaustion, this Court assured prisoners who had filed federal petitions but failed to exhaust state remedies that they "nevertheless are entitled to resubmit a petition" once they had presented to the state courts all of the issues upon which they sought relief from federal court. Professors Liebman and Hertz best sum up the arbitrariness of such a rule in their treatise Federal Habeas Corpus Practice and Procedure: "[a]pplying the no-second-bite rule makes no sense when a prior petition gave the prisoner what amounts to *no* bite at the apple . . . . " Liebman & Hertz, § 28.3a (2d ed. 1994); see also § 28.4d ("a second or subsequent petition is not truly 'successive' if the prior petition, although attacking the same judgment, was dismissed without prejudice.") Mr. Slack has never had a bite at the apple, and the lower courts' arbitrary deprivation of that opportunity was fundamentally unfair. If it does not GVR, this Court should grant plenary review to correct the unprecedented rule applied by the lower courts, which conflicts with every other circuit that has considered the issue.

VIII.

CONCLUSION

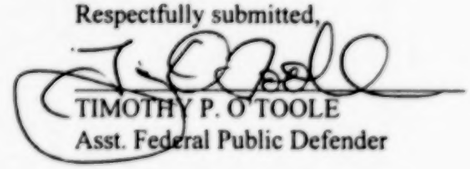
By determining that the current petition was "second or successive" and thereby applying

---

[6] And see *Lonchar*, 517 U.S at 330 ("given the importance of a first federal habeas petition it is particularly important that any rule that would deprive of all access to the writ should be both clear and fair").

the severe default rules of McCleskey before completion of the first round of habeas review, the lower court decisions ran afoul of the intervening authority in Martinez-Villareal, as well as every other published opinion on the subject. The most efficient way to resolve this problem is to grant the petition, vacate the judgment and remand to the Court of Appeals for reconsideration in light of Martinez-Villareal. In the alternative, this Court should grant plenary review to resolve the split of authority created by the unprecedented decisions below.

Respectfully submitted,



TIMOTHY P. O'TOOLE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 2, 1998, she served a copy of the attached Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States Mail, postage paid to the addressee named below:

Julie Slabaugh
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717

Solicitor General of the United States
Department of Justice
Room 5614
10 Street & Constitutional Ave. N.W..
Washington, D.C. 20530

Antonio Tonton Slack
#31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Jacque Magee
Jacque Magee, Secretary

000024

CAROL C. FITZGERALD CLERK
BY DEPUTY
DEC 10 4 23 PM '91
RECEIVED AND FILED

1991

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, CV-N-91-561-HDM

Petitioner,

v. ORDER TO SHOW CAUSE

DIRECTOR, NEVADA DEPARTMENT OF PRISONS and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

Petitioner is in state custody, having been sentenced in May 1990. Based on the petition filed herein, and good cause appearing:

It is hereby ORDERED that the clerk of the court forward copies of said petition in this order to the Attorney General of the State of Nevada and to the respondent, Director, Nevada Department of Prisons.

It is further ORDERED that the respondents file a response to the petition on or before the 27th day of December, 1991, on the merits of the petition. Respondents shall serve a copy of the response upon Petitioner.

/ / /

It is further ORDERED that if any pleading or other paper submitted to be filed and considered by the court does not include a certificate of service upon Respondents or counsel for Respondents, it will not be considered by the court, and it will be returned to the petitioner.

Dated this 9th day of December, 1991.

Howard G. McKibben
UNITED STATES DISTRICT JUDGE

CAROL C. FITZGERALD
CLERK
BY DEPUTY
FILED
RECEIVED
AND FILED
Feb 20 7 22 PM '92

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK,
Plaintiff(s),
vs.
DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al.,
Defendant(s).

CV-N-91-561-HDM

MINUTES OF THE COURT

February 19, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Antonio Tonton Slack, in Pro Se

Counsel for Defendant(s): Kevin G. Higgins

PROCEEDINGS: Telephonic Hearing on Petitioner's Motion to Stay Habeas Proceedings (#5)

9:10 a.m. Court convenes.

Court and counsel confer.

There being no objection by either party,

IT IS ORDERED that this action is dismissed without prejudice. Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies.

9:15 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By: Bette Stewart
Deputy Clerk

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

FEB 11 1 35 PM '93
CLERK
FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	)	CASE NO. C92060
	)	DEPT. NO. IV
-vs-	)	DOCKET NO. C
ANTONIO TONTON SLACK, #0926733 Defendant,	)	

O R D E R

DENYING PROPER PERSON PETITION FOR

POST-CONVICTION RELIEF

DATE OF HEARING: 9-2-92
TIME OF HEARING: 9:00 A.M.

The Proper Person Petition for Post-Conviction Relief of Antonio Tonton Slack having come before the above entitled Court on the 2nd day of September, 1992, this Court having duly considered the Proper Person Petition for Post-Conviction Relief and Respondent's Answer in Opposition to the Petition for Post-

/ / /

/ / /

CE08

FEB 10 1993

Conviction Relief and good cause appearing the Court does hereby enter the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. The trial of this matter occurred between February 20 and February 22, 1990 in Department IV of the Eighth Judicial District Court. The trial jury returned a verdict of guilty of Murder of the Second Degree With Use of a Deadly Weapon. Thereafter, the court imposed consecutive sentences of life with the possibility of parole in the Nevada State Prison. Additionally, the Court stipulated that Slack should pay $2,413.50 in restitution.

2. A direct appeal was pursued to the Nevada Supreme Court and by its Order Dismissing Appeal filed November 5, 1991 the conviction and sentence of Slack were affirmed.

3. Defendant Slack did cause to be filed on July 10, 1992 a Proper Person Petition for Post-Conviction Relief wherein he alleged that he had received ineffective representation of counsel at the trial and appellate levels and that the Court had committed judicial error during his trial proceedings. The Court does expressly find that all of the allegations raised by the Defendant are contradicted by the record in this case. Slack was represented by Michael Gardner of the Clark County Public Defender's Office at the trial and appellate levels. The Court finds that his representation was effective, professional, vigorous and thorough. The petition of Slack has failed to establish that the representation of Michael Gardner was deficient or that Slack was

/ / /

/ / /

prejudiced by the manner in which he was defended by counsel.

4. Slack has complained in his petition that his trial counsel failed to determine what type of agreement was reached with Kamal Bey, who was a principal State's witness. The Court finds that this contention is totally specious. The preliminary hearing and the trial record explicitly established the nature of the agreement between Bey and law enforcement. In return for Bey's cooperation as a witness the State of Nevada agreed to withdraw its motion to have Kamal Bey certified to stand trial as an adult. However, the substantive charge of accessory to murder in the juvenile system was not affected by the agreement. Subsequently, Bey was committed to Elko for six months as a result of the finding in Juvenile Court regarding the accessory to commit murder offense. Accordingly, this Court finds that Defendant Slack and his attorney were completely aware of the parameters of the agreement reached between Kamal Bey and the prosecution. Further, this Court finds that trial counsel was not ineffective in failing to file a pre-trial motion in limine to exclude the testimony of Kamal Bey. Nothing about the status of Kamal Bey made him incompetent to be a prosecution witness. Effective trial representation does not require the filing of frivolous pre-trial motions. Slack argues that his trial counsel failed to interview Slack's brother to refute the testimony of Kamal Bey. However, the testimony of a family member would have been inherently suspect and of questionable credibility in the eyes of the jury. Also, this contention is a naked allegation unsupported by any factual predicate. Slack

/ / /

contends that his counsel was ineffective in failing to file a pre-trial motion in limine to exclude reference to prior sexual relations with the victim. This contention is frivolous. In its Order Dismissing Appeal filed November 5, 1991 the Nevada Supreme Court ruled that the prosecution's reference to the intimate relationship between Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend association with the victim. Hence, this issue has already been addressed by the State Supreme Court and the Court finds that their previous ruling remains the law of this case. Slack submits that his counsel was ineffective in not requesting an accomplice instruction. This Court finds no evidence that Kamal Bey was an accomplice to murder. Consequently, the Court would not have given an accomplice instruction had one been proffered by trial counsel for Defendant Slack. Slack also argues that he was prejudiced by the failure of his counsel to present evidence to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey. This assertion is a naked allegation unsupported by the record. Furthermore, Defendant Slack made various admissions to citizens and to representatives of the North Las Vegas Police Department accepting responsibility for the shooting of Alanna Holmes. Accordingly, the Court finds that the totality of the evidence introduced at the trial was overwhelming proof that Slack was the shooter of Alanna Holmes.

5. Slack also argues that he received ineffective representation during his direct appeal. The Court finds that this

/ / /

/ / /

contention is without merit. Slack contends that a Franklin violation should have been raised on direct appeal. However, there is no evidence that Kamal Bey was an accomplice in the shooting of the victim. The only evidence involved Kamal Bey as an accessory to the murder of Alanna Holmes. The Franklin rule applies to accomplice testimony. Therefore, the Court finds that the Franklin issue was not applicable to this case. Likewise, since there is no evidence that Bey was an accomplice it was not incumbent upon appellate counsel to argue before the State Supreme Court that an accomplice instruction should have been given to the trial jury. Additionally, this Court finds no evidence of prosecutorial misconduct in the record of the trial proceedings. So, the failure of appellate counsel to raise the issue of prosecutorial misconduct does not establish ineffective representation.

6. The Court also rejects all arguments by Slack that judicial error occurred at his trial. This Court finds that the trial court properly instructed the trial jury. Instructions regarding accomplice testimony were not applicable in that no accomplice testified. The issue regarding premeditation is now academic. The trial jury convicted Slack of Murder of the Second Degree With Use of a Deadly Weapon and not murder of the first degree.

CONCLUSIONS OF LAW

1. Slack's claim of ineffective assistance of counsel must be analyzed under the "reasonably effective assistance" standard articulated in Strickland v. Washington, 466 U.S. 668 (1984), and

/ / /

/ / /

adopted by the Nevada Supreme Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied 471 U.S. 1004 (1985). The Strickland standard requires a two-prong analysis. First, a defendant must show that his counsel's performance was deficient. This analysis requires a showing that counsel made errors so serious that a defendant's attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced his defense and caused him to be deprived of his right to a fair trial. See also Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388 (1990). This Court concludes as a matter of law that Defendant Slack has failed to establish that his trial and appellate counsel provided ineffective representation and Slack has failed to show that he suffered any prejudice by the manner in which he was represented at the trial and appellate levels. Additionally, Defendant may not litigate in a petition for post-conviction relief matters which have been decided on his direct appeal. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975); Walker v. State, 85 Nev. 337, 343, 455 P.2d 34 (1969) and State v. Loveless, 62 Nev. 312, 150 P.2d 1015 (1944).

2. Further, the Court concludes that Slack's proper person petition consists entirely of factual claims which are belied or repelled by the record of these proceedings. A defendant seeking post-conviction relief is not entitled to an evidentiary hearing or to any of the remedies he seeks based upon factual allegations which are contradicted by the record. See Hargrove v. State, 100

/ / /

/ / /

Nev. 498, 686 P.2d 222 (1984) and Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

DECISION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is the Order of this Court that Defendant Slack's Proper Person Petition for Post-Conviction Relief is hereby denied.

DATED this 11th day of February, 1993.

DISTRICT JUDGE

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799

BY
MELVYN T. HARMON
Chief Deputy District Attorney
Nevada Bar #000862

kjh

JUN 30 '95
CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 25088

FILED
DEC 30 1993
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On May 23, 1990, the district court convicted appellant of one count of second degree murder with use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison two consecutive terms of life with the possibility of parole. This court dismissed appellant's direct appeal. Slack v. State, Docket No. 21421 (Order Dismissing Appeal, November 5, 1991).

On July 10, 1992, appellant filed in the district court a petition for post-conviction relief. In his petition, appellant argued that he was denied his right to effective assistance of counsel at trial and that he was denied his right to effective assistance of counsel on direct appeal. Appellant further argued that the district court erred by failing to instruct the jury on the credibility of accomplice testimony and premeditation. Specifically, appellant stated the following about his trial attorney: 1) he failed to find out what type of agreement was made with Kamal Bey, the state's key witness and appellant's co-defendant; 2) he failed to file a motion in limine to prohibit the introduction of evidence concerning prior sexual relations with the victim; 3) he failed to file a motion in limine to prohibit the testimony of Kamal Bey because Bey's agreement with the state required specific

testimony by Bey; 4) he failed to interview appellant's brother even though the brother's testimony would have rebutted Bey's testimony; 5) he failed to examine Bey about Bey's agreement with the state; 6) he failed to request an accomplice instruction; and 7) he failed to introduce evidence concerning fingerprints belonging to Bey which were found on the murder weapon. Further, appellant stated the following about his appellate attorney: 1) he failed to raise as an issue on appeal a Franklin violation which occurred during trial; 2) he failed to raise the issue that appellant's trial counsel failed to request an accomplice instruction; 3) he failed to raise the issue that Kamal Bey was a co-defendant and thus Bey's testimony was questionable; and 4) he failed to raise the issue that there was prosecutorial misconduct in that the prosecutor failed ~~to~~ inform the jury that Bey was a co-defendant and that Bey's fingerprints were the only fingerprints found on the murder weapon.

The state opposed appellant's petition. In its opposition, the state claimed that appellant's allegations are repelled by the record. On February 11, 1993, the district court, without appointing counsel or conducting an evidentiary hearing, denied appellant's petition for post-conviction relief. The district court concluded that appellant's allegations are belied or repelled by the record and that appellant was not entitled to an evidentiary hearing on his claims. This appeal followed.

When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Our review of the record on appeal and specifically our review of the transcript of appellant's trial,

reveals that appellant's claims are repelled by the record. The terms of the state's agreement with Bey were fully disclosed to the jury. At trial, appellant's theory of the case was that he accidentally shot the victim. Appellant testified that his finger was on the trigger when the gun fired. It is therefore irrelevant that Bey's fingerprints were found on the weapon. Bey was neither an accomplice nor a co-defendant. Appellant was not prejudiced by the lack of an accomplice testimony instruction. Appellant's remaining claims are similarly repelled by the record. The district court properly denied appellant's petition for post-conviction relief.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant cannot demonstrate error in this appeal, and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we

ORDER this appeal dismissed.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Gerard J. Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex A. Bell, District Attorney
Antonio Tonton Slack
Loretta Bowman, Clerk

RECEIVED
MAR 27 1995
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

FILED
'95 MAR 27 P1:22
LINDA [illegible]
CLERK
BY [illegible]
DEPUTY

JONTO T. SLACK
me

31395
ison Number

IV STATE PRISON
lace of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JONTO TONTON SLACK, Petitioner
Full Name)

vs.

S.K. McDANIEL, Respondent.
Name of Warden, Superintendent,
ailor or authorized person having
ustody of petitioner.)

and

he Attorney General of the State
f NEVADA, Additional
Respondent.

IOTE: if petitioner is attacking a
udgement which imposed a sentence to
e served in the future, petitioner
ust fill in the name of the state
here the judgement of conviction was
ntered.)

CV-N-95-00194-DWH (N/A)

**Petition For A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. §2254
BY A PERSON IN STATE CUSTODY**

1) Name and location of the court which entered the judgement of conviction under attack: THE 8th JUDICAL DISTRICT COURT LAS VEGAS NEVADA

2) Date judgement of conviction was entered: MAY 22, 1990

3) Case number: C-92030

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5 YEARS TO LIFE TERMS

a) In a capital case where death penalty has been imposed, date of scheduled execution N/A

BEST AVAILABLE COPY

5) Are you pesently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes [ ] No [XX]

6) Nature of the offense involved; (all counts) SECOND DEGREE MURDER WITH THE USE of DEADLY WEAPON

7) What was your plea? (check one)

a) Not Guilty [XX] b) Guilty [ ] c) Nolo Contendere [ ]

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement:

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury [XX] b) A judge without a jury [ ]

10) Did you testify at trial (if any)? Yes [XX] No [ ]

11) Did you appeal from the judgement of conviction?

Yes [XX] No [ ]

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPREME COURT of NEVADA, CARSON CITY, NV. ~~DISMISS~~ DISMISSED on NOV. 05, 1991 CASE NO. 21421

13) If you did not appeal, explain briefly why you did not: _____

a) Did you seek permission to file a late appeal?

Yes [ ] No [ ]

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: PETITIONER WAS DENIED HIS 6th AMENDMENT RIGHT TO AN EFFECTIVE ASSISTANCE of COUNSEL AT PRE-TRIAL & TRIAL; & PETITIONER DENIED HIS 6th AMENDMENT TO EFFECTIVE ASSISTANCE of COUNSEL ON DIRECT APPEAL

(2) Supporting Facts: (Without citing legal authority or arguments state briefly the facts which support your claim.)

SEE ATTACHED PAGE 3A-3B

'SE NO.

ST-CONVICTION PETITION WRIT of HABEAS CORPUS

ROUN ONE SUPPORTING FACTS:

PETITIONER'S COUNSEL of RECORD FAILED TO CONDUCT PROPER PRE-TRAI/ D TRIAL PROCEEDINGS IN The following MANNERS: FAILED to find OUT WHAT Kind of deal KAMAL BEY, MADE WITH the 'ATE FOR HIS TESTIMONY. 2) FAILED TO FILE A PRE-TRAI MOTION IN LIMINE STOP The INTRODUCTION of PRIOR SEXUAL RELATIONS with The VICTIM. FAILED TO file A PRE-TRIAL MOTION IN LIMINE To Stop the Testimony of KAMAL BEY, HIS DEAL With The STATE WAS BASED TOTALLY ON HIS TRIAL TESTIMONY, IN THAT THE HE WASN'T Completed. 4) FAILED TO INTERVIEW DEFENDANT'S Brother TO REFUTE : TESTIMONY of KAMAL BEY. 5) TRIAL COUNSEL FAILED TO have disclosed WHAT AL WAS MADE WITH KAMAL BEY AND the STATE. 6) COUNSEL FAILED TO REQUEST ACCOMPLICE INSTRUCTION. 7) COUNSEL FAILED to HAVE IT DISCLOSED TO The JURY That ONLY FINGERPRINTS found on The MURDER WEAPON WERE NOT the DEFENDENT'S AND 'E Those of KAMAL BEY The DEFENDENT'S Co-DEFENDENT. 8) COUNSEL FAILED to PRESENT the JURY that KAMAL BEY WAS A KNOWN GANG MEMBER. ~~PETITIONER~~ PETITIONER. 'PEAL COUNSEL WAS INEFFECTIVE AND PREJUDICED This PETITIONER By FAILING To ISE The following ISSUES ON APPEAL:

~~APPELLATE~~ APPELLATE COUNSEL FAILED TO RAISE A FRANKLIN ISSUE ON DIRECT APPEAL. APPELLATE COUNSEL FAILED TO RAISE THAT TRIAL COUNSEL FAILED to Request AN Accomplice struction from the TRIAL COURT. 3) APPELLATE COUNSEL FAILED TO RAISE INEFFECTIVE :SISTANCE of TRIAL COUNSEL ON DIRECT APPEAL. 4) APPELLATE COUNSEL FAILED to RAISE 'E ~~ISSUE~~ ISSUE that there WAS PROSECUTORIAL MISCONDUCT WHEN ~~THE~~ The PROSECUTOR LED To Inform THE JURY That KAMAL BEY WAS A SUSPECT AND also CO-DEFENDENT. PPELLATE COUNSEL FAILED To RAISE The ISSUE That KAMAL Bey's TESTIMONY WASN'T ST WORTHY DUE ~~TO~~ To the FACT that KAMAL BEY WAS A CO-DEFENDENT.

COUNSEL'S FAILURE TO DO The ABOVE PREJUDICED This PETITIONER AND

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgement of conviction did you raise this issue? Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: WRIT of Habeas Corpus Post-Conviction (PURSUANT TO 177.315 ET. SE The 8th JUDICIAL COURT DISTRICT of CLARK COUNTY. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition? Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition? Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Tes [ ] No [ ], and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE SUPREME COURT of THE STATE of NEVADA CARSON CITY, NV. CASE NO. 25088 DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

B)(1)Ground Two: THE TRIAL COURT VIOLATED PETITIONER'S 6th AND 14th AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE TRIAL COURT DEPRIVED THE PETITIONE of His Rights to A FAIR AND IMPARTIAL TRIAL. When THE TRIAL COURT failed to Properly INSTRUCT the JURY ON Accomplice's Testimony.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

Post-conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision : WRIT of HABEAS CORPUS (Post-Conviction) PURSUANT TO 177.315 ET. SEQ, THE 8TH JUDICIAL DISTRICT COURT of THE STATE of NEVADA IN AND for THE COUNTY of CLARK LAS VEGAS, NV. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition? Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition? Yes [XX] No [ ]

(g) If your answer to (f) is "yes', state whether This issue was raised in the appeal, Yes [ ] No [ ], and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE Supreme COURT of The STATE of NEVADA CARSON City, NEVADA DISMISSED ON DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "no", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

c)(1) Ground Three: THERE WAS PROSECUTORIAL MISCONDUCT IN PETITIONER'S CASE THAT PREJUDICED PETITIONER

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE PROSECUTION WITH HELD from JURY that THE ONLY FINGERPRINTS FOUND ON THE MURDER WEAPON WERE HAMAI BEY, ALSO THAT HE WAS A CO-DEFENDANT IN THE CASE.

(3) Sttement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes [ ] No [XX]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: ATTORNEY of RECORD DIDNOT RAISE this ISSUE on direct Appeal

Post-Conviction Proceddings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the the court where the motion or petition was filed, the result and date of the court's decision: WRIT of Habeas CorpusPOST-CONVICTION PURSUANT TO 177.315 ET. SEQ.) THE 8th JUDICIAL COURT COUNTY of CLARK, NEV. 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition? Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition? Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes [ ] No [ ], and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPPEME COURT of NEVADA CARSON CITY, NV DISMISSED DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain:

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue:

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes [XX] No [ ]

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them:

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes [XX] No [ ]. If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: U.S. DISTRICT COURT, DISTRICT of NEVADA. 1) INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT. 2) TRIAL COURT IMPROPERLY ALLOWED PRE-JUDICIAL EVIDENCE of PRIOR SEXUAL RELATIONS 3) THE REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS; 4) PREMEDETATION WAS IMPROPERLY defined TO JURY. PETITION FOR WRIT of HABEAS CORPUS, PURSANT TO 28 U.S.C. 2254 DISMISSED without PREJUDICE FEBRUARY 19, 1992

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack?
Yes [XX] No [ ]. If "Yes", state the name of the court and the nature of the proceeding: UNITED STATES DISTRICT COURT, PETITION of WRIT of HABEAS CORPUS PURSANT TO 28 U.S.C. 2254
CASE NO. CV-N-91-561-HDM

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes [XX] No [ ] If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: R. MICHAEL GARDNER, DPD; TREAL & APPEAL 309 S. THIRD STREET LAS VEGAS, NV. 89155
VICTOR AUSTIN, DPD, ARRAIGNMENT AND PLEA 309 S. THIRD STREET LAS VEGAS, NV. 89155
R. MICHAEL GARDNER DPD, SENTENCING [redacted] 309 S. THIRD STREET LAS VEGAS, NV. 89155
COUNSEL'S APPOINTED by THE COURT.

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

Antonio T. Slack
Signature of Attorney (if any) Signature of Petitioner

Attorney"s full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

Executed at Ely State Prison (Location) on May 19 (Date), 19 95

Antonio T. Slack
(Signature)

ANTONIO T. SLACK #31393
P. Box 1989
ELY, NEV. 89301

PER SE

UNITED STATES DISTRICT COURT
DISTRICT of NEVADA

TONIO T. SLACK,
PETITIONER,
V
CTOR, NDOP, ET AL.,
RESPONDANT /

CASE NO. CV-N-95-194-DWH

MOTION FOR APPOINMENT of COUNSEL

COMES NOW PETITIONER, ANTONIO T. SLACK, proceeding IN PER SE, WITH THE ASSISTANCE of HIS INMATE LAW CLERK, [redacted] #[redacted], and hereby moves this COURT for IT'S ORDER APPOINTING COUNSEL IN THIS HABES CORPUS WRIT ACTION.

This MOTION is MADE in Good faith and based upon: 28 U.S.C. SEC. 1915 (D) AND 18 U.S.C. SEC. 3006A (G) and is further made and based upon these pleadings and papers on file herein and AFFIDAVIT.

DATED This ____ DAY of June, 1995.

Respectfully Submitted,

Antonio T. Slack

ANTONIO T. SLACK #31393
P.O. Box 1989
ELY NEV. 89301

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK
PETITIONER,

V

DIRECTOR, NDOP, ET AL.,
RESPONDANT

CASE NO. CV-N-95-194-DWH

AFFIDAVIT OF PETITIONER

I, ANTONIO T. SLACK, hereby sweah under the penalty of prejury appear under oath and state that:

1) PETITIONER IS INDIGENT AND CANNOT AFFORD TO PAY FOR AN ATTORNEY TO REPRESENT HIM IN THIS MATTER.

2) PETITIONER IS ILLITERATE AND INCOMPETENT WITH THE KNOWLEDGE OF LITIGATING THE L.A.W.

3) PETITIONER HAS BEEN RECEIVING ASSISTENCE FROM INMATE LAW CLERKS ASSIGNED TO NDOP'S LAW LIBRARIES ON THIS CASE.

4). PETITIONER'S CASE HAS MERIT AND A GOOD CHANCE OF SUCCESS WITH THE ASSISTANCE OF AN ATTORNEY, PER THE NEVADA BAR ASSOCIATION AND AMERICAN BAR ASSOCIATION.

DATED THIS _____ DAY OF _____, 1995

_____

ANTONIO T. SLACK #31395

Respectfully Written and Submitted,

Mr. Antonio T. Slack
ANTONIO T. SLACK 31395
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Written - and signed on the ___ day of June 1995.

Certificate of Service

I, Antonio T. Slack, an Ely State Prisoner on the ___ day of June, 1995. Have placed in the United States mail a true and correct copy of this letter ~~[illegible]~~ addressed to the following:

Frankie Sue Del Papa / ATTORNEY GENERAL /
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89301

_____

ANTONIO T. SLACK #31395
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301